Supreme Court, U.S.
FILED
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IN THE

Supreme Court of the United States

October Term, 1998

No.

EDWARD BOJEKIAN and FLORENCE BOJEKIAN

Petitioners

v.

FORT LEE PLANNING BOARD; MAYOR AND COUNCIL OF THE BOROUGH OF FORT LEE; EAST/WEST VENTURE, A Partnership of the State of New York

Respondents

Petition For A Writ of Certiorari To The Supreme Court of New Jersey

PETITION AND APPENDIX FOR WRIT OF CERTIORARI

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4/98

QUESTIONS PRESENTED

1. Should the escarpment of the Palisades Cliffs--one of the tri-state region's most precious natural features--be destroyed by a structural tower constructed at the base of the rock face, without access to the courts and an opportunity on the part of New Jersey residents whose properties on the cliffs are specially injured, to challenge the rezoning amendments required by Fort Lee's settlement agreement with a private developer?

2. By refusing access to the state courts to hear a property owner's complaint challenging a land use settlement, did the state courts unconstitutionally violate and deny plaintiffs' rights to defend their property and to secure due process of law under the Fifth and Fourteenth Amendments?

3. In promising a high-rise

developer that it would rezone plaintiffs' low-rise residential district, did the local zoning officials, by prejudgment, convert the land use hearing process into a charade, in violation of the Fourteenth Amendment's guaranty of an opportunity to be heard in defense of property rights?

TABLE OF CONTENTS

Questions Presented i

Table of Authorities iv

Opinions below 2

Jurisdiction 5

Constitutional Provisions Involved. . .6

Statutory Provisions Involved 7

Statement of the Case 7

Reasons for Granting the Writ 16

1. THE DISMISSAL AT THE OUTSET OF PLAINTIFFS' ACTION IN 1994 WAS IN VIOLATION OF THE RIGHT OF ACCESS TO THE COURT SECURED BY THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT AND BY THE NEW JERSEY CONSTITUTION, ART.1, ¶1, AND ART.6, §5, ¶4. 16

II. A BINDING PROMISE TO ADOPT LOCAL ZONING AND LAND USE AMENDMENTS, MADE IN ADVANCE OF PUBLIC HEARING, IS AN UNCONSTITUTIONAL PREJUDGMENT, IN VIOLATION OF EQUAL PROTECTION AND REMEDIAL UNDER THE FOURTEENTH AMENDMENT 22

Conclusion. 26

Appendix. 1A

TABLE OF AUTHORITIES

Cases	Page
Bojekian v. Fort Lee Planning Board, et al, 286 N.J. Super. 311, 669 A.2d 260 (App.Div. 1996)	2,4,8,13,15
Fifth St.Pier Corp. v. City of Hoboken, 22 N.J. 326 (1956)	23
Garrou v. Teaneck Tryon Co., 11 N.J. 294 (1953)	20,21
Goldblatt v. Town of Hempstead, 369 U.S. 590, 82 S.Ct. 987, 8 L.Ed 2d 130 (1962)	18
Hurtado v. California, 110 U.S. 516, 4 S.Ct. 11, 121 (1884)	20
Hyman v. Muller, 1 N.J. 124 (1948)	23
Montville Tp. v. Block 69, Lot 10, 74 N.J. 1 (1977)	23
Nectow v. City of Cambridge, 277 U.S. 183, 48 S.Ct. 447, 72 L.Ed. 842 (1928)	18
Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 43 S.Ct. 158 (1922)	19
Twp. of River Vale v. Town of Orangetown, 403 F.2d 684 (2d Cir. 1968)	19
Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926)	18

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Respondents

PETITION FOR WRIT OF CERTIORARI

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioners, Edward Bojekian and Florence Bojekian, his wife, pray that a writ of certiorari issue to review the judgment and order of the Supreme Court of New Jersey filed in this action on September 24, 1998.

OPINION BELOW

The Bojekians filed a complaint (to protect the value of their home on the Palisades cliffs from zoning damage due to defendants' high-rise construction) on April 25, 1994, in the Superior Court of New Jersey under Docket No. L-3983-94. The trial judge immediately, on May 27, 1994, ordered that their action could not proceed and that

> "the Court will not hear . . . [their] case, prerogative writ, captioned in any other fashion, any other motion . . . ."

It permitted the Bojekians to be objectors in a related affordable housing case, known as the East/West litigation, pending in the same court. Both the dismissed case and the East/West case were heard and decided in an interlocutory opinion of the Superior Court of New Jersey, Appellate Division, decided January 5, 1996, reported at 286 N.J. Super. 311, 669 A.2d 260 (App.Div. 1996).

As to the Bojekians, the Appellate Division ruled:

> "It would therefore be fundamentally unfair to preclude the objectors from challenging subsequent amendments to the master plan and zoning ordinance on procedural and substantive grounds."

The 1996 opinion was a final judgment with respect to all issues covered by a Settlement Agreement for an affordable housing project, but was a partial judgment approving the affordable housing settlement. In February, 1996, the Bojekians moved in the trial court to be heard on the zoning and planning issues under an amended complaint challenging the municipality's master plan and zoning amendments. The trial court denied the motion for leave to file an amended complaint and to reinstate the 1994 action, and the Bojekians filed a second appeal to the Superior Court of New Jersey, Appellate Division in 1998. The court noted that it had earlier held in

its first opinion in 1996 that

> "any person or entity who did or did not attend the 'fairness' hearing, with the exception of Edgewater, is not bound by the trial judge's determination that the proposed master plan amendment and ordinance were valid from a zoning and planning perspective."

It nevertheless, in an unreported opinion dated April 7, 1998, held that its earlier ruling "cannot fairly be read as intending to grant the Bojekians the right to file a challenge to the amended ordinance which had been adopted sixteen months earlier." Its 1998 opinion left standing the 1994 dismissal and resulted in the denial of access to any court by the Bojekians in their attempt to preserve the value of their home from the zoning damage, estimated at $162,072 (43% of the fair value of their $375,000 residence), from East/West's proposed luxury 538-unit, 42-story high-rise tower. An appeal by the Bojekians from the prior interlocutory rulings and from the Appellate Division's

1998 ruling was dismissed by a New Jersey Supreme Court order filed September 24, 1998.[1]

JURISDICTION

The judgment of the Supreme Court of New Jersey was filed on September 24, 1998. This Court's jurisdiction is invoked under 28 U.S.C., §1257, of the Judicial Code, authorizing review by this Court by writ of certiorari of cases decided in the highest state courts of appeal.[2]

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[1]The Appellate Division's 1996 opinion is reported at 286 N.J. Super. 311, 669 A.2d 260 (App.Div. 1996). Its 1998 opinion and the New Jersey Supreme Court's dismissal order appear in the Appendix hereto.

[2]Pursuant to R.14.1(b), the parties to the Superior Court action that the Bojekians attempted to pursue in 1994 included three defendants who remain in the case: The Fort Lee Planning Board; the Fort Lee Mayor and Council; and the developer, East/West Venture, a partnership. Two originally-named defendants, the County of Bergen and River Ridge Condominium Association, who were additional signatories to the Settlement Agreement challenged by the Bojekians, were precluded from participating in the 1998 appeal for failure to file briefs by Orders of the Appellate Division entered August 13, 1997.

Plaintiffs believe that, following the New Jersey Supreme Court's dismissal of the appeal in September, 1998, the developer, East/West Venture, a New York Partnership, transferred its development

CONSTITUTIONAL PROVISIONS INVOLVED

1. *U.S. Constitution,*

Amendment V. ". . .[N]or shall any person. . . be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation."

Amendment XIV. ". . .No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law. . . ."

2. *N.J. Const., Art.I, ¶ 1,* provides:

"Natural and Unalienable Rights. 1. All persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property . . . ."

3. *N.J. Const., Art.6, § 5, ¶ 4,* provides:

"Prerogative writs are superseded and, in lieu thereof, review, hearing and relief shall be afforded in the Superior Court, on terms and in the manner provided by rules of the

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rights to The Palisades A/V Company, L.L.C. (hereinafter either "the Palisades Company," "the developer," or "East/West's successor.") Although the Palisades Company is not a party, service of this Petition will be made on its attorneys for the Fort Lee project.

Supreme Court, as of right, except in criminal causes where such review shall be discretionary." (Emphasis added)

STATUTORY PROVISIONS INVOLVED

1. *Municipal Land Use Law ("MLUL"), § 6(a), N.J.S.A. 40:55D-10(a)*, provides:

"The municipal agency shall hold a hearing on each application for development. . . ."

2. *MLUL, § 7.2, N.J.S.A. 40:55D-13*, provides:

"The Planning Board shall give: (1) public notice of a hearing on adoption, revision or amendment of the master plan. . . at least 10 days prior to the date of the hearing."

3. *MLUL, § 3.3, N.J.S.A. 40:55D-6*, defines the term "party immediately concerned" as follows:

"'Party immediately concerned' means for purposes of notice any applicant for development, the owners of the subject property and all owners of property and government agencies entitled to notice under section 7.1 (C.40:55D-12)."

STATEMENT OF THE CASE

Among New Jersey's most precious natural assets are the Palisades Cliffs bordering the Hudson River shoreline and the

magnificent views of the New York skyline of those living on and at the top of the Cliffs. In economic terms, the views of New York and of the lower Hudson River valley held by Fort Lee residents are a critical aspect of their property values. In petitioner's case, the view--i.e., the economic obsolescence resulting from its taking--has been appraised at 43% of the property's fair market value.

The Bojekian plaintiffs have owned and resided at a home in Fort Lee, at the top of the Palisades Cliffs, for over 44 years. When they learned in March, 1994, of a developer's plan to build a 538-unit, 42-story high-rise tower on an adjacent parcel, and of the municipality's upcoming consideration of a rezoning of their low-rise residential district to allow the tower to be built, under a Settlement Agreement between the developer and Fort Lee (of litigation to which they were not

parties), the Bojekians immediately filed suit, in April, 1994, to defend and protect their property value--before any rezoning, before any settlement agreement was signed and approved, and before Fort Lee's Planning Board adopted any master plan amendments for their neighborhood.

Filed immediately, before any rezoning or master plan amendments, plaintiffs' complaint was dismissed at the outset. Although an Appellate Division ruling was made in their favor in 1996 (that "fundamental fairness" required that Fort Lee residents have a hearing on the rezoning measures), New Jersey's state courts, including the same appellate panel that in 1996 mentioned "fundamental fairness," in later decisions have ruled that plaintiffs' complaint was properly dismissed upon its filing in 1994 and, indeed, that plaintiffs are time-barred from challenging the rezoning of the

adjacent parcel.

The Bojekians live in an older home, near the top of the Palisades Cliffs in Fort Lee, but it has a magnificent, nearly panoramic view of the New York skyline and of the lower Hudson River valley; their real estate appraisal expert valued the view at 43% of the fair value of their property, $375,000, and submitted an appraisal report that the zoning damage resulting from East/West's proposed luxury 42-story high-rise building, treated as "external obsolescence," amounted to "$375,000.00 x .43 = $162,072.00 rounded." The adjustment made by the expert for "view" in a comparable sales analysis of other Fort Lee properties with a river view was "about 10%," but the appraiser reported that other market studies "show this range to go as high as 50%." Using a "conservative" approach, the appraiser determined that "a middle compromise" at

43% was warranted, with the result that the value of plaintiffs' fee would drop from $375,000 to $213,000, if the view of the New York skyline and harbor from plaintiffs' house is blocked.[3],[4]

The dismissal of their April, 1994, complaint without trial or other due process was in violation of plaintiffs' property rights under the Fourteenth Amendment to the United States Constitution.

On an interlocutory appeal in 1996, the

---

[3]The appraisal proofs, if permitted to be heard, would include the expert's opinion that the subject's "future seemed assured in keeping with the neighborhood" but that "a hi-rise building, such as is being built, completely destroys the homogeneity of the neighborhood." In addition to losing the view, the plaintiffs' value damage results from the loss of light and air and from "being overshadowed by a hi-rise structure."

[4] It is undisputed that East/West's 42-story tower, accommodating 538 luxury condominium units (if built under Fort Lee's enabling rezoning measures), will be one of the largest structures built in northeastern New Jersey in terms of bulk and width. Of importance to the tri-state region, against the recommendations of the Regional Planning Association, the structure will be built at the base of the Palisades Cliffs, not merely at the top, thereby obscuring the face of the cliffs. The enormity of the construction is accentuated when it is considered that the tower of 30 stories will be constructed upon the top of a 12-story parking garage built at the base, but never completed, in 1972.

Appellate Division seemed to agree that the Bojekians had a constitutional right to be heard under the Due Process Clause.[5]

On remand in the related case, the Superior Court nevertheless went on to enter a Final Judgment of Compliance permitting the East/West project to proceed but without permitting the Bojekians or their appraisal and planning witnesses to be heard. Denial of access to the court was affirmed in 1998 when the Appellate Division ruled that the Bojekians would be left in the same position as "those who slumber on their rights;" i.e., precluded from being heard on the zoning and planning issues raised either in their original April, 1994 complaint or in their proposed

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[5]In 1996, the court stated:
"It would therefore be fundamentally unfair to preclude the objectors from challenging subsequent amendments to the master plan and zoning ordinance on procedural and substantive grounds. . . ." 286 N.J. Super., at pp.331-33.

supplemental complaint.

On their further appeal to the New Jersey Supreme Court, the denial of access to the court on the theory that plaintiffs were merely "objectors" who were "time-barred" was dismissed for failing to raise a substantial constitutional issue.

The Bojekians attempted to raise the federal questions sought to be reviewed here at every stage in the proceedings, both in the court of first instance and in the appellate courts. When the East/West settlement agreement was approved at a joint high-school meeting of Fort Lee's zoning officials on March 9, 1994, plaintiffs filed a four-count complaint in the Superior Court of New Jersey, on April 25, 1994, alleging in paragraph 14 of their first count "that the proceedings taken on March 9 were unconstitutional and void in that they violated the Due Process Clause and Equal Protection Clause of the

Fifth and Fourteenth Amendments to the United States Constitution." Their first demand on the first count was for a judgment securing their rights "under the Fourteenth Amendment by invalidating the East/West agreement. . . adopted March 9, 1994."

Similarly, when the court refused to hear their complaint but said that they could file contentions as "objectors" in East/West's case, plaintiffs alleged in written objections filed May 31, 1994, that the proceedings taken on March 9 "were unconstitutional and void in that they violated. . . their rights to due process of law and equal protection of the law, including their right to notice, hearing, and an opportunity to defend and protect the value of their property, secured by the Fourteenth Amendment . . . ."

And, in opposing defendants' motion to

dismiss their separate case, plaintiffs submitted a certification to the trial judge on May 19, 1994, alleging prejudgment as follows:

> "To the extent that the settlement agreement prevents the exercise of the Bojekians' right to a public hearing by an unbiased tribunal, they seek a declaratory judgment that the contract between the defendants is unlawful and unconstitutional. The most objectionable provisions of the contract--which, it is alleged, is a contract to control the outcome of the required public hearings--are paragraphs B and C of Part II. These provide as follows:
>
> 'B. Master Plan Amendments - The Planning Board agrees to amend the Housing Element of the Master Plan so as to make it consistent with this Agreement and any Judgment flowing from this Agreement within 30 days of a ruling by the Superior Court approving this Settlement.
>
> C. The Implementing Ordinance - Fort Lee agrees to adopt, within 30 days. . . the attached ordinance. (Exhibit E).'"

Except for the reference to fundamental fairness and a right of Fort Lee residents to be heard on zoning and planning amendments in the Appellate Division's

1996 interlocutory opinion, 236 N.J. Super.311, 669 A.2d 260 (App.Div. 1996), New Jersey's trial and appellate courts either lost sight of or otherwise declined to deal with plaintiffs' constitutional claims.

REASONS FOR GRANTING THE WRIT

1. THE DISMISSAL AT THE OUTSET OF PLAINTIFFS' ACTION IN 1994 WAS IN VIOLATION OF THE RIGHT OF ACCESS TO THE COURT SECURED BY THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

The Bojekians did everything within their own power to defend the value of their property and to obtain a hearing or trial in the Superior Court on their timely-filed complaint. The radical and sudden turn taken by the Fort Lee zoning authorities--to enter into a settlement agreement committing the Borough to rezone--involved special injury to the petitioners and to numerous other persons in Fort Lee.

The rezoning and the replanning of

plaintiffs' district were prejudged by the promises to the developer made by the Borough in the East/West Settlement Agreement. Any failure to adopt the rezoning and master plan amendments and to change Fort Lee's long-standing land use plan would constitute a breach of contract by the Borough. It was plainly the case that the Borough had bargained away its power to zone and to plan and that the rezoning feared by the plaintiffs had been effectively accomplished by a contract with the developer, approved by the Superior Court itself.

In dismissing the suit upon its filing, the trial judge ruled:

> "If they are to have a voice, they have to have that voice on June 15 <u>as an objector</u> at the compliance hearing." (Emphasis added)

At the compliance hearing, the Bojekians

were denied the right of cross-examination of witnesses. Their subpoenas were quashed or modified. They were put in the position of being "an objector" to a project, as opposed to parties with access to the court.

This Court has entertained suits attacking local zoning ordinances on fourteenth amendment grounds. See, e.g., Goldblatt v. Town of Hempstead, 369 U.S. 590, 82 S.Ct. 987, 8 L.Ed. 2d 130 (1962); Nectow v. City of Cambridge, 277 U.S. 183, 48 S.Ct. 447, 72 L.Ed. 842 (1928); and Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926).

Plaintiffs have satisfied the requirements of those cases by alleging that Fort Lee's rezoning measures are arbitrary, capricious and the result of prejudgment, and that plaintiffs are adversely and specially injured.

The summary refusal of courts to permit constitutional challenges to local zoning ordinances must be reversed; and the lower courts are without power to refuse access to persons whose constitutional rights have been violated. In Twp. of River Vale v. Town of Orangetown, 403 F.2d 684 (2d Cir. 1968), plaintiff alleged in its complaint that its property had been and will be depreciated in value without due process of law. It claimed a violation of its constitutional rights, but the lower court entered a summary dismissal. In reversing and remanding, the Second Circuit ruled:

> "That allegation, although it could and should have been made more explicit. . .is adequate to invoke the due process clause of the fourteenth amendment." 403 F.2d, at 685.

Abrogation of constitutionally protected rights of property may amount to a taking.

In Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 43 S.Ct. 158 (1922), this Court

held that if a state law were applied to the case, the statute would be "admitted to destroy previously existing rights of property and contract. The question is whether the police power can be stretched so far. . . ." None of the grounds for refusal to permit plaintiffs' challenge to the rezoning of their district reflects "a public interest sufficient to warrant so extensive a destruction of the [petitioners'] constitutionally protected rights." 43 S.Ct., at p.159. It is settled that the Fourteenth Amendment expresses a limitation against the actions of "public agents transcending the limits of lawful authority, even when acting in the name and wielding the force of the government." Hurtado v. California, 110 U.S. 516, 4 S.Ct. 11, 121 (1884).

In Garrou v. Teaneck Tryon Co., 11 N.J. 294 (1953), New Jersey's highest court viewed zoning suits initiated by

private citizens more sympathetically, recognizing that:

> "[Plaintiffs'] proceeding . . .serves not only his private interests but those of the entire community as well. . . ." 11 N.J., at 305.

Garrou also dealt with a property owner whose home adjoined the subject premises and who alleged "special damages in that he and his family are being discommoded and his property depreciated." Id., at 300. The Supreme Court held that the dismissal was improper, ruling:

> "It may very well be that at the close of the entire case, the trial court. . .will deny the relief sought against the defendant municipal officials. . . .But, be that as it may, the showing at the end of his case was sufficient to withstand the motion to dismiss grounded on the alleged absolute unavailability of any proceeding in lieu of prerogative writ to compel enforcement of the ordinance." Id., at 304.

For a period of four years, from 1994 to 1998, the Bojekians made every effort to be heard in an exercise of their constitutional right to defend the value

of their property and to uphold the long-standing master plan and land use plans for their area. Nonetheless, the New Jersey courts have refused to permit them to be parties to an action and have now ruled that their case does not involve "a substantial question" arising under the Constitution.

II. A BINDING PROMISE TO ADOPT LOCAL ZONING AND LAND USE AMENDMENTS, MADE IN ADVANCE OF PUBLIC HEARING, IS AN UNCONSTITUTIONAL PREJUDGMENT, IN VIOLATION OF EQUAL PROTECTION AND REMEDIABLE UNDER THE FOURTEENTH AMENDMENT.

Plaintiffs attempted to urge that the settlement agreement between the Borough and the East/West partnership represented illegal contract zoning. The most offensive provision is ¶II(B), providing as follows:

> "B. Master Plan Amendments - The Planning Board agrees to amend the Housing Element of the Master Plan so as to make it consistent with this Agreement. . . ."

This provision resulted in a prejudgment

of the land use issues raised by plaintiffs' complaint. New Jersey's Municipal Land Use Law ("MLUL") provides:

> "The municipal agency shall hold a hearing on each application for development. . . ." MLUL, § 6(a), N.J.S.A. 40:55D-10(a).

It needs no extensive argument that municipal zoning officials may not prejudge either an application for development or zoning and master plan amendments. To do so makes the public hearing a charade.

Due process requires that a litigant be allowed to make an "impressionable contact with the powers of decision." Fifth St.Pier Corp. v. City of Hoboken, 22 N.J. 326 (1956). Any procedure which deprives an individual of a property interest must conform to the dictates of the Due Process Clause. Montville Tp. v. Block 69, Lot 10, 74 N.J. 1 (1977). It was early recognized in Hyman v. Muller, 1 N.J. 124 (1948), that the essential elements of due

process of law as guaranteed by the Fourteenth Amendment of the United States Constitution are:

> "Appropriate notice of the judicial action and adequate opportunity to be heard. . . Procedural due process contemplates a trial according to some settled course of judicial proceedings. . . Due process in judicial proceedings implies action in conformity with the general law, based upon evidence, and after a full hearing upon notice to the parties affected and opportunity to be heard. Judgment without. . .opportunity to be heard lacks the very attributes of a judicial determination. . . ." Id., at 129.

MLUL, § 3.3, N.J.S.A. 40:55D-6, defines the term "party immediately concerned" as follows:

> "'Party immediately concerned' means for purposes of notice any applicant for development, the owners of the subject property and all owners of property [within 200 feet]."

To conclude: A private settlement contract with a developer that robs a citizen of the ability to make an "impressionable contact with the powers of decision" at a public hearing at the

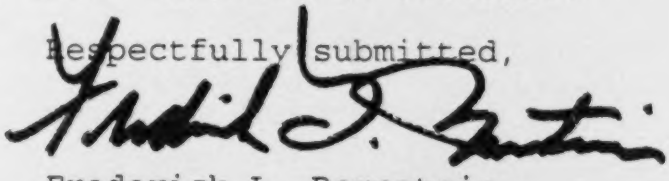
municipal level--that commits the municipal zoning authorities to adopt a specified land use plan in advance of notice to the interested parties and hearing--is ultra vires the authority granted to municipal bodies in MLUL and in violation of both the state and federal Bill of Rights. Before defendants' 538-unit luxury tower is constructed and the face of the Palisades is blocked, plaintiffs have, as initially recognized in this case in 1996, the constitutional right to be heard, as a matter of fundamental fairness, on the zoning and planning harms both to them and to the public. The stifling of any dissent to the East/West project involves a great potential of harm to the public interest and, insofar as the plaintiffs are concerned, denies them the right to be heard in violation of the rights of access guaranteed by the United States

Constitution.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the refusal of the state courts of New Jersey to hear and decide plaintiffs' challenge to the rezoning of their residential district.

Respectfully submitted,



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APPENDIX TO PETITION FOR WRIT OF CERTIORARI

SUPREME COURT OF NEW JERSEY
M-22 September Term 1998
46,140

FILED September 24 1998
Stephen W. Townsend, Clerk

EDWARD BOJEKIAN, et al,
Plaintiffs-Respondents

v.

FORT LEE PLANNING BOARD, et al,
Defendants

and

EAST/WEST VENTURE,
Defendant-Movant

ORDER

This matter having been duly presented to the Court, it is ORDERED that the motion to dismiss the appeal is granted for failure to state a substantial constitutional question under Rule 2:2-1(a)(1).

WITNESS, the Honorable Deborah T. Poritz, Chief Justice, at Trenton, this 23rd day of September, 1998.

/s/ Stephen W. Townsend

CLERK OF THE SUPREME COURT

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-3359-96T5

FILING DATE
APPELLATE DIVISION
APRIL 7, 1998

EDWARD BOJEKIAN and FLORENCE BOJEKIAN,

Plaintiffs-Appellants

v.

FORT LEE PLANNING BOARD, MAYOR AND COUNCIL OF THE BOROUGH OF FORT LEE, EAST/WEST VENTURE, a Partnership of the State of New York, THE COUNTY OF BERGEN and RIVER RIDGE CONDOMINIUM ASSOCIATION

Defendants-Respondents

Argued February 23, 1998 -
Decided April 7, 1998

Before Judges Havey and Newman

On appeal from Superior Court of New Jersey, Law Division, Bergen County

Frederick L. Bernstein argued the cause for appellants (Mr. Bernstein, on the brief)

Frederic S. Kessler argued the cause for respondents Mayor and Council of the Borough of Fort Lee and Fort Lee Planning Board (Tompkins, McGuire & Wachenfeld and Mark K. Follender, attorneys; Mr. Kessler and Mr. Follender, of counsel and on the joint brief)

Henry A. Hill argued the cause for respondent East/West Venture (Hill Wallack, attorneys; Stephen Eisdorfer, on the brief)

Respondents County of Bergen and River Ridge Condominium Association did not file briefs.

In this Mount Laurel[6] litigation, plaintiffs Edward and Florence Bojekian appeal from an April 15, 1996 order denying their motion to reinstate a previously dismissed prerogative writs complaint and to file a supplemental complaint. We affirm.

In East/West Venture v. Borough of Fort Lee. 286 N.J. Super. 311 (App. Div. 1996),

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[6]Southern Burlington County N.A.A.C.P. v. Township of Mount Laurel, 67 N.J. 151, appeal dismissed and cert. denied, 423 U.S. 808, 96 S.Ct. 18, 46 L.ed. 2d 28 (1975) (Mount Laurel I); Southern Burlington County N.A.A.C.P. v. Township of Mount Laurel, 92 N.J. 158 (1983) (Mount Laurel II).

we affirmed as modified an order entered in the Law Division approving a partial settlement of Mount Laurel builder's remedy litigation between plaintiff East/West Venture and defendants Borough of Fort Lee, its Planning Board and the County of Bergen. The proposed agreement had three key components: (1) it allowed East/West to construct a thirty-story, 538-unit condominium complex on a 4.88 acre tract of land; (2) East/West would construct a sixty-unit affordable housing development; and (3) East/West would contribute $800,000 to Fort Lee's Housing Trust Fund to assist the Borough in meeting its fair share obligation. Id. at 320. The agreement represented a substantial component of Fort Lee's compliance plan, designed to meet the Borough's constitutionally imposed fair share obligation to provide 140 low- and moderate-income housing units. Id. at

319.

The settlement was the culmination of Mount Laurel litigation that was instituted in 1988 by East/West challenging Fort Lee's zoning regulations as violative of the Mount Laurel doctrine. Id. at 320. After a series of hearings before the Fort Lee Township Committee, its Planning Board and Bergen County, a written settlement agreement was executed on March 21, 1994. Ibid. Edgewater Township intervened. Ibid. The Bojekians filed their own prerogative writs action challenging the proposed settlement. Ibid. Judge Ciolino consolidated the Bojekians' complaint with East/West's complaint. Ibid.

A "fairness" hearing concerning the proposed settlement was conducted before Judge Ciolino in the Law Division over five days in June 1994. Id. at 321. Substantial testimony was taken concerning

the terms of the settlement. Various issues concerning land use considerations were raised and addressed. Several objectors, including Edgewater and the Bojekians, appeared and presented expert witnesses who testified in opposition to the proposal. Id. at 321, 323. In a written opinion, Judge Ciolino approved the settlement agreement. Id. at 323. He adopted the testimony of Philip B. Caton, the master appointed by Judge Skillman in 1989, id. at 320, and determined that the agreement "represents sound land use planning and is in compliance with [Council on Affordable Housing] regulations." Id. at 323. The judge also concluded that the settlement, including the provision for sixty affordable units and the $800,000 contribution to Fort Lee's Mount Laurel fund, "constituted a fair and reasonable partial settlement of Fort Lee's compliance obligation. . . ."

Ibid.

Edgewater appealed, arguing that: (1) the settlement agreement constituted "contract zoning"; (2) the settlement did not provide sufficient Mount Laurel units to satisfy the minimum standards set forth by Mount Laurel II; (3) specific provisions of the agreement were ultra vires because they conflict with the Municipal Land Use Law (MLUL), N.J.S.A. 40:55D-1 to -136; and (4) the agreement violated sound planning concepts and the purposes of zoning under the MLUL. East/West Venture, supra, 286 N.J. Super. at 319. The Bojekians joined in Edgewater's contentions, but also argued that the trial judge erred in treating them as objectors to the settlement agreement rather than deciding their prerogative writs action separately. They also claimed that the agreement was invalid because East/West's proposed

market-rate complex would be constructed on a lot that had never been legally divided. Ibid.

In our prior opinion, we affirmed the order approving the settlement to the extent that we determined that it was "fair" in the sense that it protected the interests of lower-income people on whose behalf the suit was brought. Id. at 326-27, 334-36. We also rejected the contentions raised by the Bojekians, concluding that they were clearly without merit, id. at 341, except to preserve their claim that the subject property had not been properly subdivided. Ibid.

Pertinent to the Bojekians' present appeal is our discussion in our prior opinion concerning Judge Ciolino's holding that the zoning amendments adopted or to be adopted by Fort Lee to effectuate the settlement were sustainable as consistent with sound land use principles. We held,

as a general proposition, that:

> absent an amendment to R.4:69 to the contrary, see supra, n.3, the judge should not adjudicate the zoning and planning issues implicated by the agreement. Upon a finding that the agreement is "fair," the judge, without entering judgment, should first determine whether any of the provisions of the settlement are ultra vires or otherwise invalid. He or she should then remand for appropriate amendments to the master plan and zoning ordinance necessary to implement the agreement. This procedure will assure compliance with pertinent statutory safeguards. See e.g., N.J.S.A. 40:49-2; N.J.S.A. 40:49-2.1; N.J.S.A. 40:55D-13 to -16; N.J.S.A. 40:55D-26, -28 and -62.
>
> [Id. at 328.]

We further held, in the context of this particular "fairness" hearing, that:

> any person or entity who did or did not attend the "fairness" hearing, with the exception of Edgewater, is not bound by the trial judge's determination that the proposed master plan amendment and ordinance were valid from a zoning and planning perspective.
>
> [Id. at 330.]

On October 27, 1994, during the pendency of the prior appeal, Fort Lee had in fact already amended its zoning ordinance to

effectuate the proposed settlement agreement. Edgewater filed a separate timely prerogative writs action challenging that amended ordinance. On June 19, 1995, the Planning Board adopted an amendment to the master plan consistent with the settlement agreement. Action Motors, Inc., another objector, filed a prerogative writs action challenging both the master plan amendment and previously-adopted amended ordinance. The Bojekians did not file a complaint challenging either action.

Our prior opinion in East/West was filed on January 5, 1996. On February 22, 1996, the Bojekians filed a motion to reinstate their prior prerogative writs complaint and to supplement the complaint raising substantive and procedural challenges to the October 27, 1994 amended ordinance.

Judge Ciolino denied the Bojekians' motion, concluding that the contentions

raised in the prior complaint had been adjudicated by us in our opinion and that the supplemental complaint was time-barred under R.4:69-6(b)(3).

The Bojekians' argument in their present appeal is that our opinion granted to them and all other interested parties the right to challenge the October 27, 1994 amendment to Fort Lee's zoning ordinance on substantive and procedural grounds. We disagree.

The thrust of our prior opinion was to define, in general terms, the parameters of a "fairness" hearing in approving settlement agreements reached in Mount Laurel litigation. Our focus was to clarify the issues to be considered and decided by the judge in such a hearing, underscoring that generally, when amendments to the zoning ordinance or quasi-judicial action by local zoning and planning boards is necessary to effectuate

the settlement, the matter should be remanded to the appropriate local body for action before a final order approving the settlement is entered. See also Warner Co. v. Sutton. 274 N.J.Super. 464 (App. Div. 1994).

It is true, as stated, we observed that "any person or entity who did or did not attend the 'fairness' hearing, with the exception of Edgewater, is not bound by the trial judge's determination that the proposed master plan amendment and ordinance were valid from a zoning and planning perspective." East/West Venture, supra, 286 N.J. Super. at 330. However, this observation was merely intended to highlight the fact that the findings made by the judge concerning the zoning issues were not binding on the objectors, with the exception of Edgewater. The observation cannot fairly be read as intending to grant the Bojekians the right

to file a challenge to the amended ordinance which had been adopted sixteen months earlier. Notably, during the prior appeal, all the parties knew that Fort Lee had amended its ordinance on October 27, 1994. The issue concerning whether the Bojekians were barred from challenging that legislative action by the Borough was not raised before us. Therefore, we did not address the question.

It is also true that we observed that "[i]t would be fundamentally unfair to preclude the objectors from challenging subsequent amendments to the master plan and zoning ordinance on procedural and substantive grounds." Id. at 331-32. When we filed our prior opinion, it was entirely unclear to us what additional procedural steps were necessary to be taken by the Borough or its Planning and Zoning Boards in order to effectuate the settlement agreement. Although we had

been advised that the amended zoning ordinance had been adopted, we did not know whether additional bulk variances, site plan or subdivision approvals were necessary. We did not know whether in fact the Planning Board had amended its master plan and land use element. Consequently, our focus was on preserving the objectors' right to challenge "subsequent amendments to the master plan and zoning ordinance on procedural and substantive grounds." Id. at 332 (emphasis added). It was not our intention to resurrect the Bojekians' right to challenge the amended ordinance when they failed to do so in a timely fashion after its October 27, 1994 passage. Judge Ciolino recognized that the Bojekians and their attorney were charged with notice of the passage of the amended ordinance and, because they failed to challenge it, they were time-barred

under R.4:69-6(b)(3).

The judge also properly rejected the Bojekians' argument to relax the time limitation under R.4:69-6(c) in the "interest of justice." The forty-five day rule is "aimed at those who slumber on their rights," Schack v. Trimble, 28 N.J. 40, 49 (1958), and is designed to provide a measure of repose to both governmental agencies and developers. Reilly v. Brice, 109 N.J. 555, 559 (1988); Adams v. DelMonte, A-2740-96T2, slip op. at 7 (N.J. App. Div. 1998); Washington Tp. Zoning Bd. of Adjust. v. Washington Tp. Planning Bd., 217 N.J. Super. 215, 225 (App.Div.), certif. denied, 108 N.J. 218 (1987). Edgewater filed a timely complaint challenging the amended ordinance. Action Motors also filed a prerogative writs complaint challenging the amended ordinance and the subsequent amendment to the master plan. Notably, Action Motors,

Inc. was represented by the attorney who also represents the Bojekians. No persuasive reason is advanced why the Bojekians did not join Edgewater and Action Motors, Inc. in filing a complaint in a timely manner.

Of equal importance is that this Mount Laurel litigation has been pending since 1988. The issues have been thoroughly analyzed by the court-appointed Mount Laurel master. A substantial "fairness" hearing was conducted. We also cannot ignore the fact that central to this litigation is the provision of affordable housing for the poor. In such circumstances, we are entirely satisfied that Judge Ciolino's denial of the Bojekians' application to file a new complaint challenging the October 27, 1994 amended ordinance was a sound exercise of judicial discretion.

Affirmed.

Supreme Court, U.S.
FILED
JAN 28 1999
CLERK

No. 98-1051

In the
SUPREME COURT OF THE UNITED STATES
October Term 1998

EDWARD BOJEKIAN and FLORENCE BOJEKIAN,
Petitioners,

vs.

FORT LEE PLANNING BOARD, MAYOR and COUNCIL OF THE BOROUGH OF FORT LEE, and EAST/WEST VENTURE, a partnership of the State of New York,

Respondents.

On Petition for a Writ of Certiorari
to the Supreme Court of New Jersey

BRIEF IN OPPOSITION TO THE PETITION

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Counsel for respondent
Palisades A/V Company LLC

29pp

PARENT COMPANIES AND NON-WHOLLY OWNED SUBSIDIARIES

Respondent Palisades A/V Company, LLC, has the following parent companies:

Vornado Fort Lee, LLC
c/o Vornado
Park 80 West
Plaza II
Saddle River NJ 07663

Applied Palisades, LLC
c/o Allen Goldman
5 Marine View Plaza
Suite 500
Hoboken NJ 07030

It has no non-wholly owned subsidiaries.

TABLE OF CONTENTS

PARENT COMPANIES AND NON-WHOLLY OWNED SUBSIDIARIES I

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI 1

OPINIONS BELOW 1

STATUTES INVOLVED 2

COUNTERSTATEMENT OF THE CASE 3

REASONS FOR DENYING THE PETITION 13

I. THE ISSUES PRESENTED IN THE PETITION WERE NOT PROPERLY RAISED BELOW 13

II. THE PETITION PRESENTS NO SUBSTANTIAL OR NOVEL ISSUES THAT REQUIRE REVIEW BY THIS COURT 14

CONCLUSION 24

TABLE OF AUTHORITIES

CASES

Agins v. Tiburon, 447 U.S. 255 (1980) 23

Amalgamated Food Employees Union v. Logan Valley Plaza, 391 U.S. 308 (1969) 14

Beck v. Washington, 369 U.S. 541 (1962) 14

Belle Terre v. Boraas, 416 U.S. 1 (1974) 24

Bi-Metallic Investment Corp. v. State Board of Equalization, 239 U.S. 441 (1915) 22, 23

Chase Securities v. Donaldson, 325 U.S. 304 (1945) 19

Deerfield Estates, Inc. v. East Brunswick, 60 N.J. 115, 286 A. 2d 498 (1972) 14

Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) 24

Girard v. Alverez, 144 N.J. Super. 259, 365 A. 2d 220 (App. Div. 1976) 21

Goldblatt v. Hempstead, 369 U.S. 590 (1962) 24

Jodeco, Inc. v. Hann, 674 F. Supp. 488 (D.N.J.1987) 21

Kotlarich v. Ramsey, 51 N.J. Super. 520, 144 A. 2d

279 (App. Div. 1958) 22

Logan v. Zimmerman Brush Co, 455 U.S. 422 (1982) 18

Morris County Fair Housing County v. Boonton Township, 197 N.J. 359, 484 A. 2d 1302 (Law Div. 1984), aff'd, 209 N.J. Super. 108, 506 A. 2d 1284 (App. Div. 1986) 6, 9

New Motor Vehicle Board v. Orrin W. Fox Co., 439 U.S. 96 (1978) 22

Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978) 23

Southern Burlington County NAACP v. Mt. Laurel Township, 67 N.J. 151, 336 A. 2d 713 (1975) 4

Southern Burlington County NAACP v. Mt. Laurel Township, 92 N.J. 158, 456 A. 2d 390 (1983) 4

T & M Homes, Inc. v. Mansfield, 162 N.J. Super. 497, 393 A. 2d 613 (Law Div. 1978) 21

Texaco, Inc. v. Short, 454 U.S. 516 (1982) 18

Timber Properties, Inc. v. Chester Township, 205 N.J. Super. 273, 500 A. 2d 757 (Law Div. 1984) 21

Washington Township Zoning Board of Adjustment v. Washington Township Planning Board, 217 N.J. Super. 215, 525 A.2d 331 (App. Div.), certif. denied, 108 N.J. 218, 528 A. 2d 36 (1987) 19

Wilson v. Isemenger, 185 U.S. 55 (1902) 18

Wollen v. Fort Lee, 27 N.J. 408, 142 A. 2d 881 (1958) 21

CONSTITUTIONAL PROVISIONS

N.J. Const. art. 6, §5, ¶1 12

N.J. Const. art. 6, §5, ¶ 4 12

STATUTES

N.J.S.A. 40:55D-10(a) 22

N.J.S.A. 40:55D-28 21

N.J.S.A. 40:55D-62 21

RULES

N.J. R. Ct. 2:2-2 12

N.J. R. Ct. 4:69-6 ..... 8, 11, 17, 18

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

Respondent Palisades A/V Company, LLC, hereinafter "Palisades") the successor in title to the defendant East/West Venture[1], submits this brief in opposition to the petition by Edward and Florence Bojekian (hereinafter "the Bojekians") for certiorari to the New Jersey Supreme Court.

OPINIONS BELOW

In addition to the three opinions referred to in the petition for certiorari, there was an unreported written opinion by the Law Division of Superior Court in the consolidated matters of East/West Venture v. Borough of Fort Lee et al, Dkt. No. BER-35840-89, and Bojekian v. Fort Lee Planning Board, Dkt. No. BER-L-3983-94, issued on August 10, 1994, which is not reproduced in the appendix to the petition. This opinion incorporated by reference a written report prepared by the court-appointed special master Philip B. Caton and also Mr. Caton's testimony at trial.[2]

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[1]Palisades acquired the property from East/West Venture while the matter was pending before the New Jersey Supreme Court. In accordance with New Jersey practice, the caption in the state court proceeding remained unchanged.

[2]For purposes of this brief, Palisades will refer to the opinion of the trial court as "Trial Op," Caton's written report as "Caton Rep." and the transcript of Caton's trial testimony as "Caton Tr." The decision of the Appellate Division of the New Jersey Superior Court in the Bojekians' first appeal, reported as East/West Venture v. Fort Lee, 286 N.J. Super. 311, 669 A. 2d 260 (App. Div. 1996), will be referred as "East/West" and decision of the Appellate Division in the Bojekians second appeal, which is captioned Edward Bojekian et al v. Fort Lee Planning Board et al, Dkt.

STATUTES INVOLVED

New Jersey Rules of Court

4:69-6. Limitation on Bringing Certain Actions

(a) General Limitation. No action in lieu of prerogative writs shall be commenced later than 45 days after the accrual of the right to the review, hearing or relief claimed, except as provided by paragraph (b) of this rule.

***

(c) Enlargement. The court may enlarge the period of time provided in paragraph (a) or (b) of this rule where it is manifest that the interest of justice so requires.

No. A-3359-96T5 (N.J. Sup. Ct., App. Div., April 7, 1998), and is reproduced in the Appendix to the petition for certiorari at A.3-17, will be referred to as "Bojekian Op."

COUNTERSTATEMENT OF THE CASE

The Statement of the Case submitted by the Bojekians is incomplete and, in some respects, misleading. The procedural history and the facts are set forth in detail in the opinion of the Law Division of the New Jersey Superior Court dated August 10, 1994, and the two opinions of the Appellate Division of the New Jersey Superior Court.

The East/West property, now owned by respondent Palisades, is located approximately one-half mile south of the George Washington Bridge. It consists of 4.88 acres located at the northern end of a stretch of development that is unique in New Jersey--approximately three-fourths of a mile of 30-story apartment buildings atop the Palisades. Trial Op. at 4; Caton Tr. 113-114, 118-19. These buildings tower over the adjoining residential neighborhoods. Trial Op. at 4; Caton Tr. 113-114, 118-119. The sharp contrast between these high rise buildings and the adjoining single family and two family structures, such as that occupied by the Bojekians, is a unique and distinguishing feature of this area. Caton Tr. 114.

The East/West property extends from the foot of the Palisades to the top and has been treated for planning purposes as an integral part of this unique stretch of development for more than two decades. In 1972, the then-owner of an eight-and-a-half acre property that spanned the top and the foot of the Palisades received development approvals to construct a 12-story garage on what is now the East/West property to bring it up to the level of the Palisades and to construct four 30-story towers containing a total of 1,066 units on top of the Palisades and on top of the

extension of the Palisades created by the garage. Caton Tr. 107-108, 11-112; Caton Rep, pp. 31-33. Two 30-story towers including 478 units were constructed on top of the Palisades. The reinforced concrete structure for the 12-story garage was constructed in 1974, but the project was abandoned, leaving the garage unfinished and the remaining 588 dwelling units to be constructed on top of the garage unbuilt. Caton Tr. 108-109.

In 1977, a zoning variance was granted to permit a 30-story hotel to be constructed atop the garage instead of apartments and in 1978 the property was rezoned for commercial uses, including the construction of 30-story hotel atop the 12-story garage. Caton Rep., pp. 31-33. This proposed hotel was never constructed. The property continued to be zoned for commercial development, including a 30-story hotel atop the garage. East/West, 286 N.J. Super. at 322, 669 A. 2d at 265-66.

East/West commenced suit against the Borough of Fort Lee and the Planning Board of Fort Lee in 1988 in the Law Division of Superior Court under the caption East/West Venture v. Borough of Fort Lee et al, Dkt. No. BER-35840-89. East/West, 286 N.J. Super. at 320, 669 A. 2d at 264. The suit alleged that Fort Lee was engaged in zoning that had the effect of systematically excluding low and moderate income persons in violation of the New Jersey Constitution as construed by the New Jersey Supreme Court in Southern Burlington County NAACP v. Mt. Laurel Township, 67 N.J. 151, 336 A. 2d 713 (1975), and 92 N.J. 158, 456 A. 2d 390 (1983). Following entry of summary judgment in favor of the plaintiff in 1989, the parties engaged in protracted settlement negotiations under the supervision of a special master

appointed by the trial court. East/West, 286 N.J. Super. at 320, 669 A. 2d at 264.

In 1994, the parties entered into a settlement agreement which resolved issues related to the East/West site and established a timetable for resolution of the remaining issues concerning municipal compliance with its fair share housing obligation. Id. The agreement has four central provisions:

1) In accordance with a timetable established in the agreement, Fort Lee would rezone the East/West site--which had previously been zoned for a 30-story hotel at the end of the Palisades--to permit construction of a 30-story apartment building.

2) In accordance with a timetable established in the agreement, Fort Lee would rezone a nearby property--referred to in the agreement as the "affordable housing site"--to permit construction of a mid-rise apartment building that would contain 60 units of low and moderate income housing and East/West would construct 60 units of low and moderate income housing on the "affordable housing site" within a fixed period of time, whether or not it proceeded forward with development of the 30-story apartment building.

3) East/West would also contribute $800,000 to a housing trust fund established by the municipality for the purpose of funding the construction and rehabilitation of additional low and moderate income housing.

4) In accordance with a timetable established in the agreement, Fort Lee would formulate a plan to satisfy the

remainder of its fair share of housing obligation. East/West, 286 N.J. Super. at 320-21, 669 A. 2d at 265.

Under New Jersey law, a suit alleging exclusionary zoning is a representative action brought on behalf of low and moderate income persons in the surrounding region. Any negotiated settlement must be approved by the court as fair to the represented class of low and moderate income persons. Morris County Fair Housing County v. Boonton Township, 197 N.J. 359, 484 A. 2d 1302 (Law Div. 1984), aff'd, 209 N.J. Super. 108, 506 A. 2d 1284 (App. Div. 1986). In accordance with this procedure, the parties submitted the agreement to the trial court for its approval. The trial court issued an order approving a form of public notice, establishing a procedure for interested persons to submit objections to the proposed settlement and setting a hearing date. East/West, 286 N.J. Super. at 321, 669 A. 2d at 265.

The Bojekians, who were the owners of residential property near the East/West site, then filed a separate four-count complaint in lieu of prerogative writ challenging the terms of the proposed settlement agreement under the caption Bojekian v. Fort Lee Planning Board, Dkt. No. BER-L-3983-94. East/West, 286 N.J. Super. at 321, 669 A. 2d at 265; Bojekian Op at A.6. All four counts raised issues legal rather than factual in character.[3]

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[3]Count 1 alleged that the settlement agreement had been entered into by Fort Lee without the municipality's first adopting a corresponding change in the municipal master plan and constituted unlawful contract zoning. Count 2 alleged that East/West was barred from entering into the settlement agreement because it was inconsistent with the conditions on variances granted to one or more of its predecessors in title. Count 3 alleged that a public meeting at which the

East/West filed a motion to dismiss this complaint or consolidate it with the East/West v. Fort Lee case. The trial court refused to dismiss the case, but instead consolidated it with the East/West case. East/West, 286 N.J. Super. at 320, 669 A. 2d at 265 The court advised the Bojekians that they could raise their various legal challenges to the agreement at the hearing on approval of the proposed settlement. The Bojekians filed written objections, reciting essentially the same allegations made in their complaint, together with supporting legal argument and citation to various statutes and judicial decisions.

Four other interested parties also filed objections, including the adjoining Borough of Edgewater and Action Motors, another property owner.

The trial court conducted a five-day trial on the proposed settlement. At the hearing, the Bojekians were represented by counsel and participated very actively. The trial court permitted them to present evidence. Edward Bojekian himself testified. In addition, the Bojekians presented the testimony of a planner, a real estate appraiser, and a Bergen County Planning Board employee. They offered 11 documentary exhibits into evidence. In addition, their counsel presented an extended summation and legal argument. The trial court did not permit them to cross-examine witnesses, but it did permit counsel for Edgewater

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settlement agreement was discussed by Fort Lee Borough Council and the Fort Lee Planning Board was conducted in violation of the Open Public Meetings Act. Count 4 alleged that Fort Lee had authorized subdivision of the property without proper notice and public hearing under the Municipal Land Use Law. East/West, 286 N.J. Super. at 319, Bojekian Op. at 4.

Borough, which had made similar objections, to do so.

Following trial, the trial court issued a written opinion rejecting all the objections, including those of the Bojekians. It entered what it characterized as a "final judgment," inter alia, approving the settlement agreement, consolidating the Bojekian case with the East/West case, and dismissing the Bojekian complaint with prejudice. East/West, 286 N.J. Super. at 323, 669 A. 2d at 266. The trial court retained jurisdiction to review the municipal compliance plan to meet the remainder of its fair share housing obligation. East/West, 286 N.J. Super. at 319 n.2, 329, 669 A. 2d at 264 n.2, 269.

A number of the objectors, including the Bojekians and Edgewater Borough, appealed the decision of the trial court to the Appellate Division of the New Jersey Superior Court. They did not seek a stay.

While the appeal was pending, Fort Lee proceeded on October 27, 1994, to adopt the ordinance amendments provided for in the settlement agreement, and the Fort Lee Planning Board proceeded on June 19, 1995, to adopt the master plan amendments provided for in the agreement. Bojekian Op. at A.10-11. By New Jersey court rule, any suit challenging the legality of a municipal ordinances or a master plan amendments--denominated in New Jersey practice as a "proceeding in lieu of prerogative writ"--must be filed within 45 days of the municipal action. N.J. R. Ct. 4:69-6(a). A suit challenging adoption of the ordinance amendment would have had to be filed on or before November 11, 1994. Similarly, a suit challenging adoption of the master plan amendments would have had to be filed on or before July 24, 1995.

One objector, Edgewater Borough, elected to file a timely suit challenging the ordinance amendments, which was subsequently voluntarily dismissed. A different objector, Action Motors, elected to file a timely suit challenging the master plan amendments, which was dismissed on the motion of Fort Lee. The Bojekians, although represented by the same counsel as Action Motors, elected not to file suit challenging either action or to intervene in either of the suits filed by other parties. Bojekian Op. at A.11.[4]

The Appellate Division affirmed the decision of the trial court, with certain modifications. Following Morris County Fair Housing Council v. Boonton, supra, it reaffirmed that an exclusionary zoning case could be resolved by negotiated settlement, provided that the trial court established a procedure for the receipt and consideration of objections and made a finding that the agreement was fair and reasonable to low and moderate income persons. East/West, 286 N.J. Super. at 327-28, 669 A. 2d at 268-69. It held that the trial court in the present case had properly found that the settlement agreement was fair and reasonable to low and moderate income persons. The Appellate Division held, however, that in the ordinary instance a trial court should do no more than this. It should not render any opinion as to whether the proposed ordinance and master plan would be lawful or represent sound planning, since those issues are not ripe or properly before it. Instead it should leave any issues as to the legality and propriety of the proposed zoning ordinance and master plan amendment to be raised, if at all, in a separate proceeding in lieu of

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[4]The opinion of the Appellate Division erroneously states that Action Motors also challenged the adoption of the ordinance.

prerogative writ that could be brought by interested persons once the master plan amendments and ordinance had been adopted and that would be governed by the usual substantive and procedural standards for such litigation. East/West, 286 N.J. Super. at 327-29, 669 A. 2d at 268-69.

The Appellate Division held, however, that because Edgewater held in fact fully litigated all the substantive issues raised by the objectors (including those raised by the Bojekians), the trial court had acted properly in deciding those issues. The Appellate Division affirmed the trial court on all those issues and held that Edgewater would be barred from relitigating those issues in the context of any challenge to the adoption of the zoning ordinance or master plan. East/West, 286 N.J. Super. at 324-33, 340-41, 669 A. 2d at 266-71, 275. As to the Bojekians (and others similarly situated) whose participation in the trial had been somewhat more limited, the Appellate Division held that the decision of the trial court did not affect their right to bring separate proceedings challenging the adoption of the master plan amendments and zoning ordinance, if they so chose. East/West, 286 N.J. Super. 330-333, 669 A. 2d at 270-71.

Finally, the Appellate Division held that the decision of the trial court was not a final judgment, since it did not fully resolve the issue of compliance by Fort Lee with its entire constitutional fair share housing obligation. East/West, 286 N.J. Super. at 319 n.2, 329, 669 A. 2d at 264 n.2, 269.

As noted above, the Bojekians--unlike other parties--had elected not to file a timely action in lieu of prerogative writ challenging the adoption of the master plan amendments and zoning ordinance implementing the settlement. Instead,

on February 22, 1996, more than a year after the zoning ordinance was adopted, they filed a motion captioned in their prior proceeding (whose dismissal with prejudice had been affirmed by the Appellate Division) to "reinstate" the original complaint challenging the settlement and to permit them to file a "supplemental complaint" belatedly challenging the zoning and master plan amendments. Bojekian Op. at A.11. The trial court treated this motion as an attempt by the Bojekians to file a complaint in lieu of prerogative writ outside the 45-day period authorized by N.J. R. Ct. 4.69-6 and for a waiver of the 45-day period under N.J. R. Ct. 4:69-6(c). It denied the motion by order dated April 15, 1996. Bojekian Op. at A.11-12.[5]

Following the submission by Fort Lee of a compliance plan to meet the remainder of its fair share housing obligation[6], the trial court entered a final judgment in East/West Venture v. Fort Lee on January 15, 1997.

The Bojekians then filed the present appeal to the Appellate Division of Superior Court. The appeal challenged only the order of the trial court denying the Bojekians' motion to "reinstate" and "supplement" their prior complaint. Before the Appellate Division, the Bojekians did not raise any

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[5] An immediate appeal taken by the Bojekians from this decision was dismissed by the Appellate Division on the grounds that this order of the trial court was interlocutory.

[6] The Bojekians filed objections to this plan and sought to appear and present evidence at this hearing. Their objections, however, were not directed to the compliance plan, but to the East/West agreement and the rezoning of the East/West site. The trial court rejected these objections and the Bojekians' proffered testimony as irrelevant.

federal constitutional issues. They challenged the trial court's construction and application of N.J. R. Ct. 4:69 and they asserted its actions violated their rights under the so-called "prerogative writ clause" of the New Jersey Constitution. N.J. Const. art. 6, §5, ¶ 4. Bojekian v. Fort Lee Planning Board, Brief of Appellants (N.J. Sup. Ct., App. Div.)

By decision dated April 7, 1998, the Appellate Division affirmed, holding that the trial court properly found that the challenges to the master plan amendments and zoning ordinance were out of time under R. 4:69-6 and properly exercised its discretion in refusing to waive the 45-day limit under R. 4:69-6. Bojekian Op. at A.15-17. The Appellate Division noted that its prior decision was not intended to create additional procedural rights in the Bojekians or other objectors, but merely to clarify that whatever right they had to bring suit to challenge the adoption of the master plan amendments and zoning ordinance remained unaffected by the decision of the trial court approving the settlement agreement. Bojekian Op. at A.13-15. The Appellate Division did not decide any federal constitutional issue.

The Bojekians filed an appeal as of right to the New Jersey Supreme Court from the April 7, 1998, decision of the Appellate Division. Such appeals are authorized by the New Jersey Constitution, N.J. Const. art. 6, §5, ¶1, and court rule, N.J. R. Ct. 2:2-2(a)(1), where the case involves a "substantial constitutional issue arising under the Constitution of the United States or this State."

Respondent East/West Venture filed a motion to dismiss the appeal on the grounds that the only constitutional

issue raised before the Appellate Division--violation of the "prerogative writ clause" of the state constitution--was not substantial. In their answering brief, the Bojekians raised for the first time claims of violation of procedural due process under the United States Constitution. By order dated September 23, 1998, the New Jersey Supreme Court dismissed the appeal for failure to state a substantial constitutional question.

REASONS FOR DENYING THE PETITION

I. THE ISSUES PRESENTED IN THE PETITION WERE NOT PROPERLY RAISED BELOW

The Bojekians assert that this case raises substantial issues under the Due Process Clause of the United States Constitution. They did not raise any such federal constitutional issues below before the Appellate Division of the New Jersey Superior Court. To be precise, the Bojekians' first point heading in their brief to the Appellate Division alluded to violations of the federal constitution, but the argument they made under that heading was devoted entirely to claims that the actions of the trial court had violated the "prerogative writ clause" of the New Jersey Constitution. They made no reference in the argument to the federal constitution or to any cases construing the federal constitution. Bojekian v. Fort Lee Planning Board, Brief of Appellants 22-26 (N.J. Sup. Ct., App. Div.)

The failure of the Bojekians to raise any issue under the federal constitution is accurately reflected in the opinion of the Appellate Division, which does not consider or decide any federal constitutional issue.

The Bojekians first sought to raise issues under the federal constitution in their brief in opposition to the motion by East/West Venture to dismiss their appeal to the New Jersey Supreme Court for failure to state a substantial constitutional question. Because the Bojekians did not present any federal constitutional issue in the Appellate Division, they were precluded under New Jersey practice from asserting a federal constitutional issue as a basis for appeal as of right to the New Jersey Supreme Court. Deerfield Estates, Inc. v. East Brunswick, 60 N.J. 115, 119-121, 286 A. 2d 498, 500-501 (1972).

While the order of the New Jersey Supreme Court summarily dismissing the appeal did not specify that the Bojekians were precluded from raising these issues, it did dismiss the appeal for failure state a substantial constitutional question.

It is well established that this Court cannot consider any issue not properly not raised in the state court appellate proceedings below. Beck v. Washington, 369 U.S. 541, 543 (1962); Amalgamated Food Employees Union v. Logan Valley Plaza, 391 U.S. 308, 313 n. 6, 334-36 (1969). Because the issues in the petition for certiorari were not properly raised below, the Court should deny the petition.

II. THE PETITION PRESENTS NO SUBSTANTIAL OR NOVEL ISSUES THAT REQUIRE REVIEW BY THIS COURT

On its face, the petition presents three questions. None of these questions presents any substantial or novel issue of federal constitutional law that requires review by this

Court. We shall discuss each question in turn.

The Bojekians state the first question as follows:

> Should the escarpment of the Palisades Cliffs--one of the tri-state region's most precious natural features -- be destroyed by a structural tower constructed at the base of the rock face, without access to the courts and an opportunity on the part of New Jersey residents whose properties on the cliffs are specially injured, to challenge the rezoning amendments required by Fort Lee's settlement agreement with a private developer?

As set forth above, this question does not accurately portray the facts of this case. The case does not involve the issue of whether the "escarpment of the Palisade Cliffs . . . [should] be destroyed by a structural tower constructed at the base of the rock face." The portion of the structure at the base of the Palisades is the twelve story concrete garage structure, which was constructed more than twenty years ago. The construction of this garage has never been at issue in this case. What has been at issue is whether the building constructed on top of the garage should be a 30-story hotel--as authorized by the zoning variance and the zoning ordinance--or a 30-story apartment building provided for the settlement agreement.

Moreover, the Bojekians have not been denied access to the courts. They had two opportunities to present their legal arguments to the courts. They were entitled to

appear and oppose court approval of the settlement agreement. They were also entitled to bring suit to challenge the adoption of the implementing ordinances or master plan amendments.

They availed themselves of the first opportunity. Although the Bojekians' complaint and their written objections to the settlement were purely legal in character, the trial court permitted them to participate in the evidentiary hearing. They presented evidence, including evidence only tenuously related to the issues raised by their complaint or written objections. Edward Bojekian himself testified. The Bojekians presented the testimony of a planner, a real estate appraiser, and a Bergen County Planning Board employee. They offered 11 documentary exhibits into evidence. In addition, counsel presented an extended summation and legal argument. The trial court did not permit them to cross-examine witnesses, but it did permit counsel for Edgewater Borough, which had made similar objections, to do so.

Following trial, the trial court issued an extensive written opinion addressing with specificity all the legal issues raised by the Bojekians in their complaint and their written objections, as well additional issues that they raised during the course of the trial.

On appeal, the Appellate Division held that, insofar as the trial court did more than decide whether the settlement was fair and reasonable to low and moderate income persons, it had decided more than it needed to. East/West, 286 N.J. Super. at 327-29. The Appellate Division held, however, that Edgewater had in fact fully litigated all the substantive issues raised by the objectors (including those

raised by the Bojekians). The Appellate Division reviewed the trial court's decision on all those issues, including all the issues raised by the Bojekians, and affirmed the decision of trial court on all those issues. East/West, 286 N.J. Super. at 324-33, 340-41.

The Appellate Division held that Edgewater would be barred from relitigating those issues in the context of a challenge to the adoption of the zoning ordinance or master plan. East/West, 286 N.J. Super. at 324-33, 340-41. As to the Bojekians (and others similarly situated), the Appellate Division held that the decision of the trial court did not affect their right to bring separate timely proceedings challenging the adoption of the master plan amendments and zoning ordinance, if they so chose. East/West, 286 N.J. Super. 330-333.

The Bojekians, however, elected not to file suit challenging the adoption of the master plan amendment and zoning ordinance within the 45-day time period provided for by N.J. R. Ct. 4:69-6. Instead, they sought to circumvent those rules through the ploy of filing a motion to "reinstate" and "supplement" a complaint that had been dismissed with prejudice more than a year earlier and that had never addressed the legality of the master plan or zoning amendments. The trial court recognized the Bojekians' ploy for what it was, and treated it as an attempt to file an complaint in lieu of prerogative writ challenging the adoption of the master plan amendments and zoning ordinance outside the time period specified by N.J. R. Ct. 4:69-6.

The trial court gave full consideration to the Bojekians' argument that exceptional circumstances justified

permitting the filing of an untimely complaint under N.J. R. Ct. 4:69-6(c). Finding no such circumstances, the trial court denied the motion and, on appeal, the Appellate Division affirmed.

Thus, this is not a case of the trial court improperly closing the courthouse door to litigants who have properly invoked its jurisdiction. Rather, this is a case of litigants who, for whatever reason, elected to disregard the New Jersey Rules of Court and were properly barred by the trial court from circumventing those rules.

This raises no issue of procedural due process under the United States Constitution. This Court has consistently held that the states can establish reasonable limitation periods for the filing of litigation and, having done so, action by the courts cutting off the rights of litigants who do not adhere to those limitation periods violates no right protected by the Constitution. Texaco, Inc. v. Short, 454 U.S. 516 (1982); Wilson v. Isemenger, 185 U.S. 55 (1902). As the Court observed in Logan v. Zimmerman Brush Co, 455 U.S. 422 (1982):

> Obviously, nothing we have said entitles every civil litigant to a hearing on the merits in every case. The State may erect reasonable procedural requirements for triggering the right to an adjudication, be they statutes of limitations, or, in an appropriate case, filing fees. And the State certainly accords due process when it terminates a claim for failure to comply with a reasonable procedural or evidentiary rule. [455 U.S. at

437 (citations omitted).]

States have broad discretion to determine for themselves how long or short to set limitation periods. Chase Securities v. Donaldson, 325 U.S. 304 (1945). New Jersey has elected to grant citizens very broad rights to challenge the actions of public entities, but to place strict time limits on those challenges. This reflects a strong state policy that, on one hand, public entities should be accountable to the public for the legality of their actions, and, that, on the other, public entities should be able to proceed promptly with the public's business free of lingering uncertainty that litigation might be filed at some point in the indefinite future. Washington Township Zoning Board of Adjustment v. Washington Township Planning Board, 217 N.J. Super. 215, 224-25, 525 A.2d 331, 336 (App. Div.), certif. denied, 108 N.J. 218, 528 A. 2d 36 (1987).

Thus, rejection by the Law Division of the Bojekians' effort to bring a challenge to adoption of the ordinance or master plan amendments more than a year out of time violates no rights protected by the Constitution. The Bojekians' claim that the Law Division's denial of their motion violated the Due Process Clause of the Fourteenth Amendment raises no novel or substantial issue.

The Bojekians state the second question as follows

> By refusing access to the state courts to hear a property owner's complaint challenging a land use settlement, did the state courts unconstitutionally violate and deny plaintiffs' rights to defend their property and to secure

due process of law under the Fifth and Fourteenth Amendments?

Although this question is cast in terms of the Bojekians' property rights, the Bojekians have no property rights in the whether the adjoining property is zoned for a 30-story hotel or a 30-story apartment building. It is essentially a restatement of the same constitutional claims raised in the Bojekians' first question. For the same reasons, it raises no novel or substantial issue.

The Bojekians state the third question as follows:

> In promising a high-rise developer that it would rezone plaintiffs' low-rise residential district, did the local zoning officials, by prejudgment, convert the land use hearing process into a charade, in violation of the Fourteenth Amendment's guaranty of an opportunity to be heard in defense of property rights?

The Bojekians' attack on the settlement agreement focuses on the provision that requires the Fort Lee Planning Board to adopt master plan amendments that implement the settlement to the exclusionary zoning litigation The state courts have upheld the legality of the agreement under New Jersey law. The Bojekians claim, however, that this provision of the settlement agreement denies them procedural due process because it denies them the right to influence the decision of the planning board in making amendments to the municipal master plan, specifically, the right "to make impressionable contact with the powers of

decision."

This claim is, however, based upon a fundamental error. In formulating or amending a municipal master plan as part of the zoning process, the municipal planning board makes broad policy determinations as to the future shape of the municipality. N.J.S.A. 40:55D-28. It establishes policies of general application that govern the nature and intensity of land development and redevelopment that will be permitted in the various sections of the municipality. Adoption of a master plan is an integral part of the process of adopting a zoning ordinance in New Jersey. By statute, a municipality may not adopt a zoning ordinance unless the municipal planning board has first adopted a master plan and the zoning ordinance must be "consistent with" and "designed to effectuate" the master plan. N.J.S.A. 40:55D-62. These actions are legislative in character, not judicial or quasi-judicial. They involve policy making and line-drawing functions, they are prospective rather than retrospective, and they affect the public generally. Jodeco, Inc. v. Hann, 674 F. SUPP. 488, 495 (D.N.J.1987); Girard v. Alverez, 144 N.J. Super. 259, 262, 365 A. 2d 220, 221 (App. Div. 1976); Timber Properties, Inc. v. Chester Township, 205 N.J. Super. 273, 284, 500 A. 2d 757, 763-4 (Law Div. 1984); T & M Homes, Inc. v. Mansfield, 162 N.J. Super. 497, 512-513, 393 A. 2d 613, 621 (Law Div. 1978); see generally, Wollen v. Fort Lee, 27 N.J. 408, 421-422, 142 A. 2d 881, 888-89 (1958).

The Bojekians' petition muddles this critical point by confounding the function of a planning board in formulating and amending a municipal master plan with its function in making a decision on an individual application for site plan or

subdivision approval.[7] While the New Jersey legislature has assigned both of these functions to the same body--the municipal planning board--they are fundamentally different in character. They former is legislative; the latter may be quasi-judicial. See, e.g., Kotlarich v. Ramsey, 51 N.J. Super. 520, 540-41, 144 A. 2d 279, 290-91 (App. Div. 1958).

While constitutional principles of procedural due process may guarantee the right to "impressionable contact with the powers of decision" in judicial and quasi-judicial proceedings, they guarantee no such rights in proceedings that are legislative in character. Bi-Metallic Investment Corp. v. State Board of Equalization, 239 U.S. 441, 445 (1915); New Motor Vehicle Board v. Orrin W. Fox Co., 439 U.S. 96, 108 (1978).

States have broad discretion to determine how legislative functions are to be performed. They may assign these responsibilities to elected bodies or appointed administrative bodies. They may require elaborate public notice and hearings, or none at all. They may demand that deliberations be conducted in public, or permit (or even require) them to be conducted in private. They may prohibit negotiations with particularly affected parties or mandate such negotiations. The Due Process Clause leaves the states broadly free to establish their own processes for performance of legislative functions. As the Court declared more than eighty years ago:

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[7]For example, the Bojekians suggest that the proceedings of the Planning Board were governed by N.J.S.A. 40:55D-10(a). This provision, however, applies only to individual applications for development approvals.

> Where a rule of conduct applies to more than a few people, it is impracticable that everyone should have a direct voice in its adoption. The Constitution does not require all public acts to be done in town meeting or an assembly of the whole. General statutes within the state power are passed that affect the person or property of individuals, sometimes to the point of ruin, without giving them a chance to be heard. Their rights are protected in the only way that they can be in a complex society, by their power, immediate or remote, over those who make the rule. If the result in this case had been reached, as it might have been by the state's doubling the rate of taxation, no one would suggest that the 14th Amendment was violated unless every person affected had been allowed an opportunity to raise his voice against it before the body intrusted by the state Constitution with the power. [Bi-Metallic, 239 U.S. at 445.]

The mere fact that a zoning ordinance may incidentally reduce the values of adjacent properties does not give the owners of those properties a constitutional right to prior personal notice or a judicial hearing. The Bojekians do not claim that their own property has been regulated into inutility, see, e.g., Agins v. Tiburon, 447 U.S. 255 (1980), merely that they will suffer incidental harm as a result of the rezoning of a different property. The federal constitution does not protect property owners from such incidental detriments or creates any special procedural rights where such incidental injury is threatened. Cf. Penn Central

Transportation Co. v. New York City, 438 U.S. 104 (1978); Belle Terre v. Boraas, 416 U.S. 1 (1974); Goldblatt v. Hempstead, 369 U.S. 590 (1962); Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

Like the first two questions, the Bojekians' third question raises no novel or substantial constitutional issue that requires review by this Court.

CONCLUSION

For all the foregoing reasons, respondent Palisades A/V Company, LLC, respectfully urges the Court to deny the Bojekians' petition for certiorari to the New Jersey Supreme Court.

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Respectfully submitted,
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